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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 233

RUFUS HOWARD NYE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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To the Honorables, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Rufus Howard Nye, respectfully submits this petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit in the above entitled case, decided July 22, 1943.

The Circuit Court of Appeals for the Fourth Circuit has affirmed on appeal a conviction in the District Court of the United States for the Middle District of North Carolina, upon a verdict of guilty of the violation of Section 135 of

the Criminal Code, 18 U. S. C. A. 241, upon the second count in the indictment, which is as follows:

> "That Rufus Howard Nye and Lonnie Cicero Mayers, the defendants herein, on or about April 19, 1939, in the Middle District of North Carolina, and within the jurisdiction of this Court, unlawfully, wilfully, knowingly and feloniously did corruptly influence, obstruct and impede, and corruptly endeavor to influence, obstruct and impede the due administration of justice in the Court of the United States for the Middle District of North Carolina, that is to say, the said defendants then and there corruptly did endeavor to have dismissed in said Court of the United States a civil action then pending under the number 11 on the Durham docket of the Clerk of the Court for said district, being entitled W. H. Elmore, Administrator of James Elmore, deceased v. C. T. Council and Germain Bernard, partners trading as BC Remedy Company, which said action had not yet come to trial on the merits, that is to say, said defendants did then and there cause to be filed with said Court of the United States false and fraudulently obtained letters and affidavits concerning said action, they the said defendants by such conduct thereby causing delay in the trial of said case and great expense in connection therewith, and did in truth and in fact then and there thereby corruptly influence, obstruct and impede the due administration of justice in said Court of the United States; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America."

Wherein the petitioner was sentenced to serve a term of six months in prison and to pay a fine of $500.00, and costs.

Statement of the Case.

This is a criminal action begun by indictment in the District Court for the Middle District of North Carolina, wherein there were two counts. The first count charged

your petitioner, R. H. Nye and one, L. C. Mayers with conspiracy to obstruct and impede the due administration of justice in the said court of the United States by preventing the prosecution of a civil action entitled W. H. Elmore, Administrator of James Elmore, deceased, vs. C. T. Council and Germain Bernard, partners, trading as BC Remedy Company, in said court. It was further alleged that the said action was given number 11 on the Durham Docket of the Clerk of the court for said district, and that in said action it was alleged that the death of James Elmore, a son of W. H. Elmore, was caused by the wrongful act of the defendants. This count further specified thirteen overt acts, in substance as follows:

(1) Conferred together on or about March 1939.

(2) That Nye took Mayers and Elmore to his home "Where they spent the night in a room together."

(3) On April 19, 1939, Nye took W. H. Elmore to his attorney where letters were written to District Judge Hayes, of the Middle District of North Carolina, and to William B. Guthrie, Attorney for plaintiff, in said civil action, and prepared for the signature of W. H. Elmore.

(4) That on April 19, 1939, at Lumberton Nye took Elmore to the Clerk of the Superior Court of Robeson County, where final account of Elmore, Administrator of James Elmore, deceased, theretofore prepared by Nye's attorney, was filed, and Nye paid the filing fees.

(5) That on April 19, 1939, at Lumberton, Nye paid postage and registration fees on letters from Elmore to Judge Hayes, and William B. Guthrie, Elmore's attorney.

(6) On April 20, 1939, at Durham, in the Middle District of North Carolina, "and within the jurisdiction of this Court," Nye caused to be delivered to Guthrie, Attorney

for plaintiff Administrator (W. H. Elmore) letter signed by Elmore, Administrator, under the persuasion and domination of Nye, directing dismissal of said suit then pending as Number 11 on the Durham Docket.

(7) On April 22, 1939, at Wilkesboro, in the Middle District, Nye did cause to be delivered to Judge Hayes letter signed by Elmore, Administrator, under the persuasion and domination of Nye requesting the dismissal of said suit Number 11.

(8) On April 24, 1939, in the Middle District, Nye caused to be delivered to Judge Hayes, of said District, letter addressed to Greensboro, and affidavit, concerning the case of Elmore, Administrator against BC Remedy Company, then pending in said court, signed by Albert Elmore.

(9) On May 10, 1939, in said District, Nye did cause to be delivered to Judge Hayes of said District, further letter concerning said suit, signed by Albert Elmore, addressed to Durham, North Carolina.

(10) On May 12, 1939, at Durham, in said District, Nye caused to be presented to the court for signature of Judge Hayes, order dismissing the action entitled Elmore, Administrator of James Elmore, deceased, against BC Remedy Company, "then pending therein."

(11) On July 20, 1939, Nye did appear in the District Court for said District, at Greensboro, before Honorable Johnson J. Hayes, Judge thereof, under his order, and testifying under oath concerning the matter of Elmore, Administrator of BC Remedy Company, and did then and there withhold from the court information which was material that the court should know concerning said matter then pending in said court.

(12) On August 29, 1939, at Greensboro, in said District, said Nye did cause to be filed in the office of the Clerk of

the U. S. District Court for the Middle District of North Carolina, motion to dismiss the said action of Elmore, Administrator of James Elmore, deceased against BC Remedy Company.

(13) From and after April 19, 1939, in said District, that Nye and Mayers did cause to be had in said District Court many hearings in the matter of Elmore, Administrator, against BC Remedy Company, "with great expense attached thereto and delay in the trial of said action."

The jury returned a verdict of not guilty, both as to Nye and Mayers under this first count in the bill of indictment, and guilty as to Nye under the aforesaid second count, and not guilty as to Mayers.

Your petitioner made three contentions in the District Court and in the Circuit Court of Appeals, to-wit:

(1) That the count of the indictment under which the conviction was had was not sufficient, and that your petitioner's demurrer to the bill of indictment ought to have been sustained.

(2) That the District Court erred in denying the defendant's motion for bill of particulars.

(3) That the District Court erred in denying petitioner's motion for a directed verdict of acquittal.

These motions were all denied by the District Court and the cause submitted to a jury resulting in a conviction of this petitioner on the second count, and your petitioner appealed to the Circuit Court of Appeals for the Fourth Circuit, which affirmed the judgment of the District Court on July 22, 1943.

The opinion of the Court was by Parker, Circuit Judge, and Circuit Judges Soper and Dobie agreed.

Questions Presented.

1. IS THE SECOND COUNT IN THE BILL OF INDICTMENT, UNDER WHICH CONVICTION OF THE PETITIONER WAS HAD, SUFFICIENT?

2. IS YOUR PETITIONER ENTITLED TO A BILL OF PARTICULARS?

3. IS YOUR PETITIONER ENTITLED TO A DIRECTED VERDICT OF ACQUITTAL?

Reasons for Allowance of the Writ.

1. The questions presented in this case are of national importance, in that they involved the rights of all defendants indicted under what is known as a general bill of indictment, following 18 U. S. C. A. 241, U. S. Criminal Code, Section 135. The right of a defendant "to be informed of the nature and cause of the accusation" in the indictment and, failing in this motion, he is entitled to a bill of particulars under an indictment in general terms so that he may be informed in respect to the evidence that may be presented against him in a manner that is binding on the prosecution.

These questions present the necessity, or lack of necessity, of alleging in such an indictment that the District Court had jurisdiction of the civil action, in which it is alleged that the obstruction of justice took place. This phase of the first question presents the view that, if the District Court had no jurisdiction of the civil action, then nothing further could be bottomed on it.

2. The decision of the Circuit Court of Appeals is in conflict with other decisions relating to the matters involved herein.

Pettibone v. *United States*, 148 U. S. 197, 37 L. Ed. 419;
United States v. *Hess*, 124 U. S. 486;
Brittain v. *United States*, 108 U. S. 199;

United States v. *Carll*, 105 U. S. 611, 612;
United States v. *Cook*, 84 U. S. 174;
United States v. *Standard Brewery*, 251 U. S. 210;
White v. *United States*, 67 F. (2d), 71 (10th Circuit);
Bass v. *United States*, 25 F. (2d) 294;
Reiner-Gross Co. v. *United States*, 20 F. (2d) 36;
United States v. *Matheus*, 17 F. (2d) 187;
Wishart v. *United States*, 29 F. (2d) 103 (7th Cir.).

The allegations in the second count are wholly general and specify no facts telling the Court wherein the conduct of the defendant contravened the statute under which the indictment was drawn. The indictment does not, in either count, allege the jurisdiction of the District Court in the action of *Elmore, Administrator* v. *BC Remedy Company*, and does not meet the requirement in the *Pettibone* case, *supra*.

Our search fails to disclose that there is any statute, or rule, of the Federal Courts prescribing the form of indictment under 18 U. S. C. A. 241, Criminal Code, Section 135, and the offense denounced in the statute was also an offense at common law, and the Circuit Court of Appeals declined to follow the rule in North Carolina, set forth in *State* v. *Cole*, 202 N. C. 592.

3. In the face of the general character of the bill of indictment, and its failure to set out the facts upon which the crime denounced was based, the court refused the bill of particulars. Your petitioner, therefore, had no binding information as to the particulars of the charges. While the bill of particulars does not aid a defective bill of indictment, it does inform the defendant of what he shall expect to meet in the way of proof at the trial. The decisions in the Fourth Circuit, including the opinion in the instant case, are not in harmony with the opinions in other circuits upon this question.

Your petitioner was denied any information further than the general bill of indictment, when his motion for bill of particulars was denied, leaving this second count as the sole instrument of information to satisfy the rights of your petitioner under the Fifth and Sixth Amendments to the Constitution of the United States.

4. The motion for a directed verdict presents the questions set out in the demurrer to the bill of indictment and includes your petitioner's contention that there was no proof, as well as no allegation, of jurisdiction of the District Court of the civil action of *Elmore, Administrator* v. *BC Remedy Company,* and with the proof that Elmore was a resident of South Carolina when he qualified as Administrator of James Elmore, deceased, in violation of the Consolidated Statutes of North Carolina, Section 8, sub-section 2, which is as follows: "The Clerk shall not issue letters of administration or letters testamentary to any person who, at the time of appearing to qualify— * * * 2. is a non-resident of this state."

Hall v. *Southern Ry. Co.,* 146 N. C. 345, 348;
Estate of Banks, 213 N. C. 382.

It includes also the failure of the bill of indictment to meet the requirements of the Fifth and Sixth Amendments of the Constitution of the United States, for that the bill of indictment is defective in omitting any essential element of the crime when a verdict of not guilty was proper.

WHEREFORE your petitioner respectfully prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Fourth Circuit, commanding said court to certify and to send to this Court a full and complete transcript of the record and of the proceedings in said Circuit Court of Appeals had in said matter, to the end that this cause may be reviewed and

determined by this Honorable Court, as provided by the statutes of the United States and the rules of this Court, and that the judgment herein of the said Circuit Court of Appeals be reversed by this Honorable Court, and for such other and further relief as to the Court may seem proper.

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